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# Supreme Court of the United States

OCTOBER TERM, 1946.

IN THE MATTER
*of*
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,
Debtor.

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GERALD AXELROD, *et al.*, constituting a Group of Individual Owners of the 4½% Convertible Gold Bonds of the above-named Debtor,
Petitioners,

*vs.*

JOSEPH B. FLEMING AND AARON COLNON, as Trustees of The Chicago, Rock Island and Pacific Railway Company, *et al.*,
Respondents.

No. 791.

## BRIEF OF RESPONDENTS:

1. METROPOLITAN LIFE INSURANCE COMPANY, AS REMAINING MEMBER OF THE FIRST AND REFUNDING GROUP,
2. TRUSTEES UNDER THE FIRST AND REFUNDING MORTGAGE,
3. TRUSTEE IN RESPECT OF THE SECURED 4⅛% BONDS, SERIES A,
4. PROTECTIVE COMMITTEE FOR THE GENERAL MORTGAGE BONDS,
5. TRUSTEES UNDER THE GENERAL MORTGAGE,
6. PROTECTIVE COMMITTEE FOR THE ROCK ISLAND, ARKANSAS AND LOUISIANA RAILROAD COMPANY FIRST MORTGAGE 4½% BONDS,
7. PROTECTIVE COMMITTEE FOR CHOCTAW, OKLAHOMA AND GULF RAILROAD COMPANY CONSOLIDATED MORTGAGE 5% BONDS AND CHOCTAW AND MEMPHIS RAILROAD COMPANY FIRST MORTGAGE 5% BONDS,

## IN OPPOSITION TO PETITION OF CERTAIN CONVERTIBLE BONDHOLDERS FOR A WRIT OF CERTIORARI.

## Statement.

Certain holders of an aggregate of less than $400,000 (out of a total issue of more than $32,000,000) principal amount of unsecured 4½% Convertible Bonds of The Chicago, Rock Island and Pacific Railway Company have belatedly applied to this Court for a writ of certiorari to review the order and decree of the United States Circuit Court of Appeals for the Seventh Circuit, entered on May 23, 1946, which affirmed the order of the United States District Court for the Northern District of Illinois entered on June 15, 1945, approving the modified plan of reorganization for the Rock Island System certified by the Interstate Commerce Commission to the District Court on May 1, 1944.*

Also on May 23, 1946, the Circuit Court of Appeals entered an identical order in three other appeals (Nos. 8929, 8930 and 8931) from the order of the District Court approving the plan, taken, respectively, by the Debtor, the Protective Committee for the Debtor's Preferred Stock, and the Indenture Trustee for the Little Rock & Hot Springs Western Bonds. These appeals, together with the appeal of the individual Convertible Bondholders, were heard and determined together but were not consolidated.

This Court, on November 18, 1946, denied petitions for writs of certiorari filed by two of the appellants in the

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* In the proceedings on the plan before the Commission and the District Court, the interests of the unsecured Convertible Bondholders were actively and vigorously represented by The Chase National Bank of the City of New York, as Trustee under the Indenture pursuant to which such Bonds were issued. The said Trustee did not appeal from the order of the District Court approving the plan, but the attorneys for the petitioning individual bondholders, who have throughout the proceeding been endeavoring to assert collateral and irrelevant claims against that Trustee, have filed this petition on behalf of the holders of approximately 1.2% of the Bonds of that issue.

above mentioned appeals, viz., the Debtor (Docket No. 410) and the Preferred Stock Committee (Docket No. 524).* *Chicago, Rock Island & Pacific Railway Co.* v. *Fleming et al.* and *Harrison et al.* v. *Fleming et al.*, 7 U. S. Sup. Ct. Bul. 46 (1946).

We respectfully submit that the petition of these Convertible Bondholders for a writ of certiorari should also be denied for the following reasons:

1. The time for filing the petition has expired, and this Court is therefore without jurisdiction to entertain the petition;

2. There is no merit to the contention that the petitioners were denied a hearing on their objections to the plan of reorganization, since the objections in question related to a controversy between them and the Chase National Bank which was then *res adjudicata* and has since become moot; and

3. The other questions sought to be presented are without merit.

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* A petition for a writ of certiorari to review a separate order of the Circuit Court of Appeals for the Seventh Circuit, entered on June 17, 1946, was filed by the Debtor. That order did not affect the plan of reorganization. The order determined that the holders of Choctaw and Memphis Bonds were entitled to receive interest on unpaid interest which had accrued during the reorganization proceedings. The petition for a writ of certiorari was granted and the order of the Circuit Court of Appeals was reversed by this Court on December 16, 1946. *Fleming* v. *Traphagen*, 7 U. S. Sup. Ct. Bul. 296. A petition for reconsideration has been filed and is pending.

## Argument.

**1. The time for filing the petition has expired, and this Court is therefore without jurisdiction to entertain the petition.**

The opinion and order sought to be reviewed were entered by the Circuit Court of Appeals on May 23, 1946 (Add. R. 94, 109*). Thereafter, on June 7, 1946, a petition for rehearing was filed in cause No. 8929 by the Preferred Stock Committee, and in cause No. 8938 by the individual Convertible Bondholders, the petitioners herein (Add. R. 110). On June 20, 1946, the Circuit Court of Appeals entered its order in causes Nos. 8929 and 8938 denying both petitions for rehearing (Add. R. 111).**

These petitions for rehearing were filed within fifteen days after the entry of judgment on May 23, 1946, as required by Rule 22 of the Circuit Court of Appeals for the

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* References so indicated are to the Additional Transcript of Record filed herein by the petitioners. Pages 1-92, inclusive, of such Additional Transcript of Record are printed as an appendix to the brief, dated March 12, 1946, of these petitioners before the Circuit Court of Appeals; pages 93-153 thereof are contained in the separately printed paper entitled, "Additional Transcript of Record" filed herein. References indicated by "R. ....." are to the transcript of record on the Debtor's petition for a writ of certiorari (Docket No. 410, October Term, 1946).

** Also on June 20, 1946, the Circuit Court of Appeals entered an order in all four causes (Nos. 8929, 8930, 8931 and 8938) amending its opinion filed May 23, 1946, by striking out one paragraph (the first full paragraph appearing at Add. R. 104). This amendment was on an immaterial matter. In the paragraph eliminated, the Circuit Court of Appeals had distinguished the decision of the Circuit Court of Appeals for the Tenth Circuit in *In re Denver & R. G. W. R. Co.*, 150 F. (2d) 28 (1945). After the opinion of the Circuit Court of Appeals in the present case had been rendered, this Court reversed the decision in the *Denver and Rio Grande* case, thereby making superfluous the paragraph which was eliminated.

Seventh Circuit.* The time within which these Convertible Bondholders might have applied for a writ of certiorari therefore commenced to run from June 20, 1946, the date when their first petition for rehearing was denied. Under Section 8(a) of the Judicial Code (43 Stat. 940 (1925), as amended, 28 U. S. C., §350 (1941)), their time for filing such a petition expired on September 20, 1946, i. e., three months after the entry of the order on June 20, 1946 denying the first petition for rehearing.** However, the present petition was not filed until December 17, 1946.

On September 10, 1946, these individual Convertible Bondholders filed a second petition for rehearing. No leave to file this petition was requested or granted, although the time prescribed by Rule 22 of the Circuit Court of Appeals for filing such a petition had long since expired. The petition was denied without opinion by an order entered on September 18, 1946 (Add. R. 148-149).

The present petition for a writ of certiorari, filed on December 17, 1946, was filed exactly one day short of three

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* Rule 22 of the Circuit Court of Appeals for the Seventh Circuit reads as follows:

> "Printed petition for rehearing may be filed within 15 days after entry of judgment, and shall be served forthwith by copy upon the opposing party, who within 10 days from such service, may file a printed answer, and the petition shall be determined without oral argument unless otherwise ordered. Thirty copies of such petition and answer shall be filed with the clerk of this court."

** Section 8 (a) of the Judicial Code reads as follows (43 Stat. 940 (1925), as amended, 28 U. S. C. §350 (1941)):

> "No appeal, or writ of certiorari, intended to bring any judgment or decree before the Supreme Court for review shall be allowed or entertained unless application therefor be duly made within three months after the entry of such judgment or decree, excepting that writs of certiorari to the Supreme Court of the Philippine Islands may be granted where application therefor is made within six months. For good cause shown either of such periods for applying for a writ of certiorari may be extended not exceeding sixty days by a justice of the Supreme Court."

months after entry of the order denying the second petition for rehearing, and nearly six months after denial of the first petition for rehearing. It is apparent that the purpose of the attorneys for the petitioners is to cause as much delay as possible. Nothing else can explain their filing a second petition for rehearing nearly three months after their time to file a petition for a writ of certiorari had begun to run, and then after the denial of their second petition for rehearing, waiting almost another full three months before filing this application for certiorari.

We submit that there is no question, under the decisions of this Court, that these individual Convertible Bondholders cannot, by the filing of a second petition for rehearing long after the expiration of the period allowed therefor, and without obtaining leave to file the petition late, enlarge their time for filing a petition for a writ of certiorari in this Court.

In *Gypsy Oil Company* v. *Escoe,* 275 U. S. 498 (1927), the controlling principles of law were stated as follows, at pages 498-499:

> "The running of the time within which proceedings may be initiated here to bring up judgment or decree for review is suspended by the seasonable filing of a petition for rehearing. But it begins to run from the date of denial of such petition and further suspension can not be obtained by the mere presentation of a motion for leave to file a second request for rehearing. [Citation omitted.]
>
> "If, however, a timely motion for leave to file the second petition is granted, and the petition is actually entertained by the Court, then the time within which application may be made here for certiorari begins to run from the day when the Court denies such second petition."

If the time for filing a petition for certiorari is not extended by the presentation of a motion for leave to file a second application for rehearing, it follows *a fortiori* that the time is not extended when a second petition for rehearing is filed long after the time for filing such a petition had expired and without any request whatever for leave to file the second petition for rehearing.

*Pfister* v. *Northern Illinois Finance Corp.*, 317 U. S. 144 (1942), instead of supporting the petitioners (Petition, p. 15), clearly shows that the present petition has been filed too late. In that case it was held that the denial of two successive petitions for rehearing of a referee's order, both petitions having been filed after expiration of the statutory period for review, did not extend the time for filing a petition for review under Section 39(c) of the Bankruptcy Act. 30 Stat. 555 (1898), as amended, 11 U. S. C. §67(c) (1941). This Court stated (at pp. 149-150) that where a petition for rehearing is granted and the issues of the original order are re-examined and an order is entered, either denying or allowing a change in the original order, the time for review under Section 39(c) begins to run from that entry. But where an out of time petition for rehearing is filed and the court merely considers whether the petition sets out, and the facts—if any are offered—support, grounds for opening the original order, and determines that no grounds for a re-examination of the original order are shown, the examination of the grounds for allowing a rehearing does not enlarge the time for review of the original order. This result was held to follow from the well established rule that where an untimely petition for rehearing is filed which is not entertained or considered on its merits the time to appeal from the original order is not extended.

In the present case the petition for rehearing was not granted, but was summarily denied. The Court rendered no opinion, and it does not appear that the issues decided by the original order were re-examined. Consequently, the time for filing this petition was not extended.

None of the other decisions cited by the petitioners in an effort to show that their petition for certiorari is timely are in point (Petition, p. 15). Thus in *Market Street Railway Co.* v. *Railroad Commission of California,* 324 U. S. 548 (1945), a timely appeal was taken from a judgment of the California Supreme Court after the denial of a timely petition for rehearing. It was held that the appeal was not premature merely because the local rules provided that a decision of the Supreme Court did not become final until thirty days after the filing of the decision. No issue was involved concerning the enlargement of the time for review by reason of the denial of the petition for rehearing.

In *Leishman* v. *Associated Wholesale Electric Co.,* 318 U. S. 203 (1943), it was held that a notice of appeal was in time where it was filed within the period specified by 28 U. S. C. §230 after the denial by a district court of a motion to amend and supplement the findings of fact and conclusions of law. In that case, however, the motion for such amendment had been made within the allowed period after obtaining an enlargement of time under Rule 6(b) of the Rules of Civil Procedure (28 U. S. C. A. following §723c).

In *Zimmern* v. *United States,* 298 U. S. 167 (1936) it was held that an order entered by a district court, on its own motion and during the same term of court, substantially amending a previous order of the court, extended the time for filing a notice of appeal. This decision has no relevance here.

The petitioners make the further argument that their time for filing this petition should be computed from Sep-

tember 18, 1946, the date of entry of the order denying their second petition for rehearing, because that order also continued a stay of the Court's mandate which had been granted by previous orders (Add. R. 113, 114) "until the disposition of the petitions for writ of certiorari in the Supreme Court of the United States" (Add. R. 148-149). In support of this argument they cite *Commissioner of Internal Revenue* v. *Estate of Bedford,* 325 U. S. 283 (1945).

This contention is without substance. The stay of the Court's mandate is not the judgment to be reviewed, and does not again put in issue the matters determined by the judgment, as does a petition for rehearing. In the present case the judgment order sought to be reviewed is the order of affirmance entered May 23, 1946 (Add. R. 109).

The *Bedford* case, holding that the time for filing a petition for a writ of certiorari to review a judgment of the Circuit Court of Appeals for the Second Circuit should be computed from the date of entry of the "order for mandate," was based upon the special practice and the common understanding prevailing in the Second Circuit by which the order for mandate is deemed the judgment order, and has no application to proceedings to review decisions of the Circuit Court of Appeals for the Seventh Circuit. Even so, this Court criticized the procedure of the Circuit Court of Appeals for the Second Circuit, saying (325 U. S. 283, at p. 288) that the normal time for entering a judgment, as the starting point for determining whether review will be sought or whether there has been acquiescence in the judgment, should be fixed, and that the uncertainties inherent in litigation should not be needlessly prolonged by a "variable and vagrant practice" with respect to entering the order for mandate.

Accordingly, the present petition for a writ of certiorari should be denied because not filed within the time allowed by law. Judicial Code, Section 8(a), 43 Stat. 940 (1925), as amended, 28 U. S. C., §350 (1941).

**2. There is no merit to the contention that the petitioners were denied a hearing on their objections to the plan of reorganization, since the objections in question related to a controversy between them and the Chase National Bank which was then *res adjudicata* and has since become moot.**

The petitioners' contention that they were denied a hearing by the District Court on their objections to the plan rests upon that Court's refusal to consider objections based upon a stale controversy between them and the Chase National Bank (Petition, pp. 16-17, 19-20). The contention is completely without merit. There is no possible basis for these petitioners to seek to revive that controversy here, since it is both *res adjudicata* and moot.

The Chase National Bank of the City of New York is Trustee under the Indenture relating to the unsecured Convertible Bonds and also, along with four other banks and Reconstruction Finance Corporation,* held collateral for loans made to the Debtor.

In 1940, these petitioners filed in the District Court their statement of a claim against the Chase Bank, the other banks and the R. F. C. The banks moved to dismiss the statement of claim as stating no cause of action against them, and that motion was granted on December 10, 1940. An appeal was taken by these petitioners from that ruling, but was not prosecuted and was dismissed for that reason by the Circuit Court of Appeals for the Seventh Circuit on October 3, 1941.

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* The other four banks were Continental Illinois National Bank and Trust Company of Chicago, Harris Trust & Savings Bank, Mississippi Valley Trust Company and The New York Trust Company.

Certain of the facts referred to in this point are not part of the record on this petition. They are, however, a part of the record of proceedings before the District Court and before the Circuit Court of Appeals on other appeals, and the petitioners cannot dispute them.

Thereafter, in 1941, these petitioners sought to revive this claim, which had already been dismissed, by including it in their objections to the plan certified by the Commission to the District Court on July 31, 1941 (pp. 4-8 of document following p. 50 of Appendix to Convertible Bondholders brief, dated March 12, 1946, before Circuit Court of Appeals (Add. R. 50)). The attorneys for Continental Illinois National Bank and Trust Company moved to strike this reiteration of the claim, and the District Court said at the argument of the motion on October 13, 1941 (Steno. Tr., pp. 72-74):

> "The Court: As I understand, we argued this a long while ago and you folks had an opportunity to appeal from the order and you did not see fit to do so. You could have had this reversed a long time ago. You are not going to litigate this here again.
>
> "Mr. Kirshbaum: I don't propose to. I want to point out to your Honor that at that time your Honor said—if I misunderstood, your Honor will correct me—that our petition was premature.
>
> "The Court: I don't recall that I said anything like that. There was a motion to strike and I sustained the motion."
>
> • • • • • •
>
> "Mr. Kirshbaum: Yes, it was a motion to dismiss our petition, as I understand it, for insufficiency.
>
> "Mr. Friedlich [of Counsel for Continental Illinois National Bank and Trust Company]: You did not state a cause of action.
>
> "Mr. Kirshbaum: Please, may I finish?
>
> "Mr. Friedlich: Sure.
>
> "Mr. Kirshbaum: As I understand it, your Honor never passed on the merits of that thing at all, your Honor simply passed on the petition as such.
>
> "Mr. Friedlich: How can his Honor pass on the merits if it does not state a cause of action in the first place?

"Mr. Kirshbaum: That is it exactly. In other words, at that time maybe our petition was premature.

"The Court: I did not say so.

"Mr. Kirshbaum: Well, the question in my mind is——

"The Court: I read over the different exhibits that were handed to me and I listened to the arguments, and I came to the conclusion that you did not have any right of action."

After that discussion, and on the same day, an *agreed* order was entered striking the allegation of this claim from the objection. This agreement is shown on page 11 of the document following page 50 (Add. R. 50) of the Appendix to the brief of these petitioners before the Circuit Court of Appeals. It there appears that these claims were stricken from the objections upon written agreement signed by the attorneys for these petitioners.

It is therefore impossible to understand how the attorneys for these petitioners can now advance as a ground for this petition (Petition, p. 17) the claim that they were denied a hearing on the very objections which they stipulated in writing should be deleted. It is equally impossible to understand how they can bring themselves to base their present application for review on an alleged claim against the Chase Bank when that claim has been finally adjudicated against them and they have never prosecuted their appeal from the order dismissing it.

But that is not all. In 1943 the Chase Bank made an application to the District Court to be relieved of the injunction preventing the sale of the collateral which it held. The District Court granted the application and vacated the injunction, the Chase Bank agreeing that it would make no claim against the Rock Island estate for any deficiency

owing to it after crediting the proceeds of the sale (R. 313). No appeal was taken by these petitioners or by anyone else from this order lifting the injunction as against the Chase Bank, or from the similar orders lifting the injunction as against the other banks. The banks, including the Chase Bank, sold their collateral, as the attorneys for these petitioners assert (Petition, p. 6), and as appears from the entry which the Rock Island then made on its books reflecting the sale (Add. R. 49—Appendix to petitioners' brief before Circuit Court of Appeals, p. 49). That sale necessarily made moot, in this proceeding, the alleged claim of these petitioners against the Chase Bank.

In any event, whatever the claims of these petitioners against the Chase Bank may be, why should they pursue the other creditors, who have nothing to do with this controversy, and burden this Court with a stale, moot claim which has been finally decided against these petitioners?

3. **The other questions sought to be presented are without merit.**

The Convertible Bondholders, on pages 16 to 18 of their petition and supporting brief, list eleven specifications of errors. Some of the contentions there advanced are the same as those made by the Debtor and by the Preferred Stock Committee, whose petitions for certiorari (Dockets Nos. 410 and 524) have been denied by this Court. Furthermore, most of the petitioners' contentions are disposed of adversely to them by this Court's decision in *Reconstruction Finance Corporation* v. *Denver & R. G. W. R. Co.*, 66 S. Ct. 1282 (1946). None of the questions sought to be presented is meritorious.

The specifications of errors will be briefly discussed in the order in which they are listed by the petitioners.

*As to Specifications 1 and 2.* These specifications, based upon the petitioners' controversy with the Chase Bank, have already been considered in Point 2 above. We merely note here that the Circuit Court of Appeals made no such ruling as that attributed to it in Specification 1 (Petition, p. 16). That Court merely ruled, and correctly so, that the petitioners' controversy with the Chase Bank had no relation to the merits of the plan of reorganization, which was the question before the Court (Add. R. 107-108).

*As to Specifications 3 and 4.* The petitioners seek to challenge the determination that the plan is fair and equitable and affords due recognition of the rights of the Convertible Bondholders (Petition, p. 17).

First, they seek (Petition, pp. 22-24) to attack the capitalization approved by the Commission in its May 1, 1944 order certifying the plan to the District Court (R. 249). They complain that the 1944 capitalization of $356,000,000 was approximately $12,000,000 lower than the 1941 capitalization of approximately $368,000,000 originally approved by the Commission (R. 162, 167).

The petitioners ignore, in this connection, the fact that in addition to the $356,000,000 approved capitalization, more than $38,000,000 in cash was allocated among the creditors by the 1944 plan (R. 249-250, 259).

Furthermore, the decrease of $12,010,830 in the approved capitalization was the net result of the reduction of $13,034,916 in equipment obligations between January 1, 1942, the former effective date of the plan, and January 1, 1944, the new effective date of the plan, and the increase of $1,024,833 in new common stock provided for in the plan (R. 250). The Commission recognized that the amount of equipment obligations of a railroad are subject to fluctuation upward as well as downward, and found that it would not be warranted in increasing the amounts of new securities to any greater

extent than it did (R. 250). Obviously leeway should be left to finance the acquisition of new equipment in the future. Moreover, the reduction of fixed charges resulting from the retirement of equipment obligations was found to be adequately reflected in the provision for more than $1,000,000 of additional new common stock (R. 250). These adjustments, based upon judgments in a field in which the Commission has a special competence, were within the power of the Commission to make and present no legal issues warranting review by this Court. *Reconstruction Finance Corporation* v. *Denver & R. G. W. R. Co.*, 66 S. Ct. 1282, 1289 (1946); *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448, 468, 474 (1943); *Group of Investors* v. *Chicago, Milwaukee R. Co.*, 318 U. S. 523, 544-545 (1943).

A further reason for the reduction of the approved capitalization is apparent from the face of the two plans. The 1941 plan provided for the issuance of $11,000,000 of new first mortgage bonds, constituting part of the $368,000,000, for $11,000,000 of new money to go into the System (R. 145). The 1944 plan distributed these $11,000,000 of bonds to the creditors, with the result that new money in the amount of $11,000,000 would not come into the System (R. 234, 259). Consequently, a capitalization of approximately $11,000,000 less under the second plan was clearly justified.

The petitioners further complain (Petition, p. 8) of the allocation of $38,011,922 in cash and $12,409,600 of new first mortgage bonds in addition to the allocations made by the Commission in the plan approved by its July 31, 1941 report, contending that these allocations were in addition to 100% satisfaction of the secured creditors' claims.

The fallacy of this contention is that it assumes that the creditors were paid in full by the allotment of securities made in the Commission's first plan. That the secured creditors would not have been paid in full by such allot-

ments is obvious from the fact that their claims are nowhere near satisfied in full even by the allotments under the Commission's modified plan, including the cash allotments. The secured creditors of the Rock Island, together with the amounts of their claims at the effective date of the plan, i. e., January 1, 1944, and the deficiencies in their claims remaining after receipt of the new securities and cash allocated to them under the plan (R. 259), are shown by the following table. The deficiencies are shown when calculated by taking new no par value common stock at $100 per share, and also by taking such stock at $50 per share, the amount which it has been adjudicated by the Commission and the District Court to be worth in determining that the General Mortgage Bonds are wholly satisfied and will have no deficiency under the present plan (R. 237-243, 252-254, 301-302).

| Secured Claims | Claim at Jan. 1, 1944 | Deficiency taking new common at $100 | Deficiency taking new common at $50 |
|---|---|---|---|
| General Mortgage | $ 86,213,400 | $ None | $ None |
| C. & M. First Mortgage | 5,286,000 | None | None |
| First and Ref. | 156,870,859(A) | 28,628,683 | 57,606,900 |
| Secured 4½s | 59,021,174 | 6,760,283 | 18,569,382 |
| C. O. & G. | 8,296,867 | 358,746 | 872,239 |
| St. P. & K. C. S. L. | 27,495,118(A) | 8,108,509 | 13,404,485 |
| R. I. A. & L. | 16,362,500 | 3,384,223 | 5,922,916 |
| B. C. R. & N. | 16,912,500 | 6,634,467 | 9,539,383 |
| Total | $376,458,418 | $53,874,911 | $105,915,305 |

(A) Includes bonds now outstanding, formerly pledged for bank loans.

*As to Specification 5.* This specification relates to the payment of the R. F. C. loan, pursuant to Court order, after the approval of the plan by the Commission (Petition, p. 17).

The petitioners complain of the alleged ruling below that collateral for the R. F. C. loan, which was thus redeemed for the treasury by the use of treasury cash, should remain undistributed (Petition, p. 17). Their contention is appar-

ently stated inaccurately, since the collateral consisted of obligations of the Debtor and its subsidiaries, and it has never been proposed to distribute old securities. In any reasonably likely plan of reorganization this collateral would be cancelled. The petitioners' real objection seems to be to the ruling that there should be no redistribution of the new securities which were allotted in the plan to the R. F. C.

This objection ignores the fact that the cash used to reclaim this collateral was generated from the mortgaged lines; consequently, the collateral and any new securities issuable in respect thereof belong to the unsatisfied mortgage bondholders, not to the unsecured creditors.

Furthermore, the petitioners' objection ignores the fact that an important element of the compensation of senior creditors for their loss of position when part of their claims are satisfied under the plan by the allocation of new common stock is their right, as holders of such stock, to participate in the accumulated assets and in future earnings. As this Court pointed out in *Reconstruction Finance Corporation* v. *Denver & R. G. W. R. Co.*, 66 S. Ct. 1292, 1298 (1946), the use of such assets to retire senior claims is a part of the normal and expected increment from holdings of common stock. When the reduction of senior capital takes place after the adoption of a plan by use of anticipated earnings or existing cash, there can be no readjustment of junior participations, because assets in the balance sheet at the adoption of the plan and subsequent earnings are for the benefit of the stockholders in the new company, so that through these common stock advantages the new stockholders may be compensated for their loss of payment in full in cash.

Distribution of the R. F. C. collateral or the new securities issuable therefor would not benefit the unsecured creditors. As pointed out above (p. 16) there are $105,915,000 of unsatisfied claims of secured creditors. There are only

$28,000,000 face amount of new securities reclaimed from the R. F. C., taking the new common stock at $100 per share, or but $23,000,000, taking such common stock at $50 per share, its value as adjudicated herein (R. 237-243, 252-254, 301-302). While such deficiences exist in the satisfaction of secured creditors' claims, unsecured creditors would not be entitled to the collateral upon a distribution thereof. These petitioners are in fact benefited by leaving the new securities in the treasury, because every creditor in effect now shares in them according to his allocation of new securities, particularly new common stock. That includes the Convertible Bondholders, who are allotted 10.68% of the new common stock (R. 259).

The petitioners' often-reiterated quotation of the Commission to the effect that payment of the R.F.C. claims "would necessitate material modification in the plan" is incomplete and misleading (Petition, pp. 9, 10, 17, 21). The Commission's statement was made not alone with respect to payment of the R.F.C. claims, but with reference to the proposals of these Convertible Bondholders for modification of the plan (R. 233-234). These Bondholders called for a compromise of the claims of the banks and the R.F.C. and suggested, in addition, changes of the plan in several important respects (R. 230). Obviously, to adopt the proposals would have required modification of the plan; but the proposals were not accepted (R. 234).

*As to Specification 6.* It is contended that the plan was formulated and adopted prior to the commencement of the war (1937-1940) and is based on depressed earnings of that period (Petition, p. 17).

This is not the fact. The Commission itself stated that it had considered the earnings from 1921 to 1930 and from 1931 to 1939 (R. 139), and also the earnings for 1940 (R. 168). After the remanding of the plan to the Commission,

pursuant to the District Court's order entered June 25, 1943 (R. 299), the Commission held hearings in September, 1943 at which the earnings of the Rock Island System, actual and prospective, were again thoroughly considered. In its supplemental report rendered on January 3, 1944, the Commission expressly referred to the evidence before it of current earnings (R. 245); and its findings in this regard were again affirmed, after petitions for modification, in the Commission's supplemental report issued May 1, 1944 (R. 250). The principal issue then before the Commission was the amount of cash available for distribution among creditors on January 1, 1944—a matter necessarily involving a current appraisal of the financial condition of the Rock Island estate.

When the Commission rendered its report and order of May 1, 1944 the war earnings for the years 1942 and 1943 were known. It is reasonable to suppose that the Commission must have anticipated that war earnings would continue longer than they did, because in May 1944 it was not expected that the war would end as soon as August 1945. There is no basis for contending, therefore, that the Debtor's earnings subsequent to May 1, 1944 have been unexpectedly large. Under these circumstances the creditors who will receive the new common stock are entitled to the benefit of earnings realized after January 1, 1944, the effective date of the plan. *Reconstruction Finance Corporation* v. *Denver & R. G. W. R. Co.*, 66 S. Ct. 1282, 1296 (1946).

*As to Specification 7.* The petitioners contend that it was error to approve the plan after its alleged alteration in several respects without resubmission to the Interstate Commerce Commission (Petition, p. 17). The claimed alterations of the plan which are complained of are (a) the payment of the R.F.C. loan, and (b) the determination that the

Choctaw and Memphis bonds should remain undisturbed and not affected by the plan (R. 312-313).

The payment of the R.F.C. loan is discussed above (pp. 17-18). There is no substance to the contention that payment of this loan was a material alteration of the plan, since the plan contemplates that some claims might be paid before consummation. Article XVII of the plan is entitled "PAYMENTS ON CLAIMS BEFORE PLAN CONSUMMATED", and expressly provides that in the event that any payment shall be made in respect of a claim prior to the consummation of the plan, securities otherwise distributable in respect thereto shall be withheld and shall be treasury securities (R. 28-29). The record leaves no doubt that the Commission had the possible payment of the R.F.C. claims in mind when this provision was being considered (R. 254-257). In holding the payment of the R.F.C. to be consistent with the plan, the District Court was clearly right when it stated (R. 307-308):

> "If any money used to pay or purchase a claim or bonds were not used in that way, it could be used, either before or after consummation of the plan, for additions and betterments or for the purchase of equipment, and it could be used after the consummation of the plan for the purchase of the securities allotted under the plan for the claims of bonds. It is no more inconsistent with the plan to pay claims or purchase securities before the consummation of the plan than it is to spend the same money for additions and betterments before or after the consummation of the plan, or to purchase securities after the plan is consummated.
>
> "Clearly the payment of a claim or the purchase of securities would not afford a basis for a redistribution of securities allotted under the plan. It would amount merely to appropriating surplus earned since the effective date of the plan to one of the several uses to which it could be applied. All those who have interests, as stockholders of the reorganized com-

> pany in the earned surplus would benefit from such a use of the money consistently with the plan, just as they would if the money were spent for additions and betterments or used after the consummation of the plan to purchase securities. If there were a redistribution of the securities that would not be true."

As for the contention with respect to the Choctaw and Memphis bonds, there are at least two complete answers.

First, the petitioners are not injured by the change and therefore have no standing to complain of it. The petitioners assume that the change was made in order to improve the allotment to the Choctaw and Memphis Bondholders, at the expense of the Convertible Bondholders. That is not the fact. The reason for the change was that the security originally provided for in the plan would sell for far more than par, and thus give the Choctaw and Memphis Bondholders more than they were entitled to (R. 306). Therefore, the treatment of the Choctaw and Memphis bonds was changed to provide that such bonds should remain undisturbed. In doing so the District Court acted under Article XXII of the plan (R. 30), which provides:

> "The construction of the plan by the court shall be final and conclusive. The court may correct any defect, supply any omission, or reconcile any inconsistency in such manner and to such extent as may be necessary or expedient in order to carry out the plan effectively."

Second, the Commission noted this comparatively minor correction of the plan and reflected it in the pamphlet submitting the plan to creditors for their vote (R. 2, footnote 3).

*As to Specification 8.* The petitioners contend that the Circuit Court of Appeals incorrectly denied itself authority to review "obsolete valuations" in the light of substantial improvements in the Debtor's financial condition (Petition, p. 17).

The Circuit Court of Appeals did not deny itself this power. The facts with respect to the Debtor's earnings and other developments subsequent to the certification of the plan by the Commission were fully presented to the Circuit Court of Appeals. Nothing in that Court's opinion even suggests that the Court felt it was without power to reverse the decision below had developments subsequent to the certification and approval of the plan justified or required such action. There simply had been no developments after the Commission had certified the plan to the District Court in 1944 which warranted reversal of the order approving the plan.

In discussing subsequent developments, the petitioners concede (Petition, p. 24) that war earnings are not a reliable criterion of future earnings, and confine their contentions to the effect of war earnings which have already been realized. The reckless claim is then made that the Debtor's financial condition has improved by $185,241,485.56 between January 1, 1940 and April 30, 1946 (Petition, p. 25).

This figure is arrived at by a patently fallacious computation. The petitioners first refer to an item of $37,246,965.49, allegedly representing total net capital expenditures (Petition, p. 25). Without conceding the correctness of this figure, we should point out that the amount of capital expenditures, actual and anticipated, was before the Commission and must necessarily have entered into its valuation of the property (R. 232). Moreover, capital expenditures necessary to enable the Debtor to maintain its competitive position do not necessarily increase earning power, the primary criterion in determining capitalization for reorganization purposes. *Reconstruction Finance Corporation* v. *Denver & R. G. W. R. Co.*, 66 S. Ct. 1282, 1293, 1295 (1946).

The petitioners next mention an item of $25,411,598.97, said to represent the net decrease in outstanding debt between April 30, 1940 and April 30, 1946 (Petition, p. 25). This must necessarily include part of the reduction of equipment obligations, although no change in the plan on this account would be justified for the reasons discussed above (p. 15). It must also include the payment of the R. F. C. and bank loans. As pointed out above (p. 17), payments of these claims were made possible by the use of earnings which were derived from the mortgaged lines and belonged to the mortgage bondholders. The unsecured creditors are entitled to no benefit from these payments, although they actually do benefit as a result of the allocation to them of approximately 10% of the new common stock (R. 259).

The petitioners also include in their computation an item of $40,310,722.02, said to represent the "value" of the R. F. C. collateral returned to the Debtor's estate (Petition, p. 25). The basis for that figure the petitioners do not reveal. However, the Commission expressly found that the liquidating value of the collateral was less than the amount of the R. F. C. claim, viz., $20,849,015 (R. 204, 245, 259). Moreover, since the claim of the R. F. C. must necessarily be included in the petitioners' figure of $25,411,598.97 as representing the net reduction of outstanding debt, it is a duplication to include also the value of the collateral. Even if the collateral were properly included, which it is not, it was recovered for the estate by the use of income from the mortgaged lines to which the mortgage bondholders are entitled. Its recovery could not benefit the unsecured creditors while the claims of the secured creditors are not fully satisfied.

Finally, the petitioners include a figure of $82,272,199.08 as representing total cash and cash equivalents as of April

30, 1946 (Petition, p. 25). The derivation of this figure likewise does not appear from the record in this proceeding. However, the figure is meaningless, since there must obviously be deducted therefrom current liabilities and necessary reserves. A statement prepared by the Debtor's Trustees and introduced in evidence at the hearings on the question of confirmation of the plan shows, as of June 1, 1946, cash and cash equivalents of $77,563,059. After deducting current liabilities, a working capital reserve of $10,000,000, a reserve of approximately $19,000,000 necessary to service the new securities issuable under the plan, payments of debt and interest to become due in 1946, and payments to be made in 1946 for additions and improvements, the net cash remaining was shown to be only $10,997,108.

*As to Specification 9.* The petitioners' complaint regarding the allocation of $12,409,600 in new first mortgage bonds and $38,011,922 in cash is not understandable (Petition, p. 18). Since these allocations were made as a part of the plan, how they could be "in direct variance with the provisions of the approved plan" is incomprehensible. Furthermore, the distribution was not made, as the petitioners imply, to the senior creditors alone. The unsecured creditors participated in the cash distribution to the extent of $406,482.

There is no basis for the petitioners' claim that the allocation of the additional new first mortgage bonds and cash violated legal and equitable standards. These allocations were made because of the improvement in the Debtor's cash position subsequent to the Commission's original plan approved by its report dated October 2, 1941. The $12,409,600 of new first mortgage bonds which were redistributed consisted of (1) $1,409,600 of such bonds allocated under the Commission's original plan to holders of Choctaw

& Memphis bonds for unpaid accrued interest to January 1, 1942, and (2) $11,000,000 of such bonds reserved under the original plan for sale or pledge to provide new money which had become unnecessary because of the increase of the Debtor's cash (R. 229). These new first mortgage bonds were distributed to the senior creditors in the same manner as first mortgage bonds had been allocated under the original plan, that is, in proportion to the relative earning power of the various mortgaged lines (R. 234).

The $38,011,922 of cash included (1) $1,762,000 allocated to holders of Choctaw & Memphis bonds for unpaid accrued interest on such bonds to January 1, 1944, the new effective date of the plan; and (2) $36,249,922, which the Commission found would have been available for payment of interest and dividends on the new securities issuable under the plan (R. 235). This surplus cash was likewise distributed among the creditors on the basis of the relative earnings of the various mortgaged properties as determined by the allocation of new securities made in the plan approved by the Commission's report dated May 1, 1944. The cash so distributed was made up of eight years' interest on the new first mortgage bonds, four years' interest on the new income bonds, two years' dividends on the new preferred stock, and a dividend of $2.50 per share on the new common stock. This method of distribution gave effect to the earnings of the Debtor and its cash position during the period when the cash was earned, and was approved by both the Commission and the District Court (R. 235, 244-245, 304).

*As to Specification 10.* The petitioners complain of the denial of their second petition for rehearing by the Circuit Court of Appeals (Petition, p. 18).

The denial of a petition for rehearing is discretionary and is not reviewable. Furthermore, the second petition for rehearing was not timely (see Point 1 above).

The petitioners themselves recognize (Petition, pp. 27-28) that there is no legal merit to their argument for reversing the order sought to be reviewed merely because the District Court has refused to confirm the plan and because the Interstate Commerce Commission has reopened the proceedings and, at the time the petition was filed, had scheduled further public hearings. We shall not undertake to comment on this argument, except to point out that the Commission, by an order dated December 27, 1946, has cancelled until further notice the hearings previously set for January 7, 1947. The Commission's order, after referring to the pending appeals from the order of the District Court denying confirmation of the plan and remanding the proceedings to the Commission, stated:

> "*It further appearing,* That in view of the aforesaid appeals, further hearings before this Commission upon such matters may not be necessary;".

*As to Specification 11.* This is merely a general reference to the possibility of there being further errors not identified.

## Conclusion.

The individual Convertible Bondholders have failed to make a timely application for a writ of certiorari, and seek to present no question having any substance or merit.

It is fair to assume, in view of the late filing of this petition and the insubstantial character of the contentions made, that a major objective of the petitioners is to obtain further delay in a reorganization which this Court said nearly twelve years ago should be consummated with all possible speed. *Continental Illinois National Bank & Trust Co.* v. *Chicago, Rock Island & Pacific Ry. Co.*, 294 U. S. 648 (1935).

**The petition of the individual Convertible Bondholders for a writ of certiorari should be denied.**

Dated January 8, 1947.

Respectfully submitted,

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